

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRED SIMPSON and U.S. POSTAL SERVICE,
VEHICLE MAINTENANCE FACILITY, Bellmawr, NJ

*Docket No. 02-802; Submitted on the Record;
Issued August 27, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits.

On January 31, 1990 appellant, a 53-year-old storekeeper, filed a notice of traumatic injury alleging that he fell in the performance of duty. The Office accepted appellant's claim for multiple contusions on February 26, 1990. Appellant returned to full duty on February 26, 1990. He then filed a notice of recurrence of disability on July 15, 1991 alleging that he developed low back pain with numbness and weakness in his legs and knees due to his January 31, 1990 employment injury. The Office accepted that appellant sustained a recurrence of disability from July 10 to 14, 1991. Appellant filed a second claim for recurrence of disability on October 4, 1991. The Office entered appellant on the periodic rolls on January 28, 1992. The Office accepted that appellant had sustained aggravation of preexisting spinal stenosis, as well as elbow, ankle and back sprains due to his January 1990 employment injury.

Appellant returned to work four hours a day on June 17, 1993. By decision dated October 6, 1993, the Office determined appellant's wage-earning capacity based on his earnings.

On May 8, 1996 appellant filed a claim for traumatic injury alleging that he fell injuring his right elbow. The Office accepted this claim for fracture of the right elbow on July 31, 1996.

By decision dated March 6, 1998, the Office denied appellant's claim for left carpal tunnel syndrome as causally related to his accepted 1990 employment injury. Through his attorney, appellant requested an oral hearing by letter dated March 24, 1998. By decision dated February 10, 1999, the hearing representative affirmed the March 6, 1998 decision of the Office denying appellant's claim for carpal tunnel syndrome. Appellant requested reconsideration of

this decision on May 5, 1999. By decision dated June 25, 1999, the Office denied modification of the February 10, 1999 decision.¹

In a letter dated May 14, 1999, the Office notified appellant that it proposed to terminate his compensation benefits. By decision dated June 25, 1999, the Office finalized its decision to terminate appellant's compensation benefits finding that he had no disability after July 17, 1999 causally related to the 1990 employment injury.

Appellant, through his attorney, requested an oral hearing on the termination of his compensation benefits. By decision dated December 9, 1999, the hearing representative affirmed the Office's November 8, 1999 termination decision. Appellant requested reconsideration on October 2, 2000 and submitted additional new evidence. By decision dated December 29, 2000, the Office stated that based on the new evidence submitted it reviewed appellant's claim on the merits but found that the evidence was not sufficient to require modification of its November 8, 1999 decision.

The Board finds the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁴ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁵

Appellant's attending physician, Dr. Burton W. Pearl, a Board-certified orthopedic surgeon, submitted reports alleging that appellant continued to experience residuals from his lateral epicondylitis and that he had developed left carpal tunnel syndrome as a consequence of either his 1990 or 1996 employment injuries.

The Office referred appellant for a second opinion evaluation with Dr. Irving P. Ratner, a Board-certified orthopedic surgeon, on July 30, 1996. In a report dated September 6, 1996, Dr. Ratner noted appellant's history of injury, listed his medical history and performed a physical examination. He found that appellant had no Tinel's or Phalen signs. Furthermore, Dr. Ratner

¹ Appellant requested review of his claim by the Board on December 5, 2001. As the Office issued the June 25, 1999 decision more than one year before the appeal to the Board, the Board will not consider the issue of carpal tunnel syndrome on appeal. 20 C.F.R. § 501.3(d)(2).

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

³ *Id.*

⁴ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁵ *Id.*

noted that appellant demonstrated gross cogwheel release in his left upper extremity which he described as an attempt to falsify the examination and exaggerate symptoms. He indicated that appellant could return to work eight hours a day with a lifting restriction of 10 pounds.

The Office found that there was a conflict of medical opinion evidence between appellant's attending physician, Dr. Pearl, a Board-certified orthopedic surgeon, and Dr. Ratner, a Board-certified orthopedic surgeon and the second opinion physician for the Office, regarding the nature and extent of appellant's disability and his employment-related conditions. Section 8123(a) of the Federal Employees' Compensation Act,⁶ provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." Due to the differences of opinion between Drs. Pearl and Ratner regarding the issue of appellant's continuing disability and whether his diagnosed condition of carpal tunnel syndrome was due to his accepted employment injury, the Office properly determined that there was a conflict of medical opinion requiring referral to an impartial medical specialist.

In this case, the Office referred appellant for an impartial medical examination with Dr. Steven J. Valentino, an osteopath physician, who indicates that he is Board-certified in orthopedic and reconstructive spine surgery.

The Office's procedure for the selection of an impartial medical specialist is detailed in the Federal Procedure Manual Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4. The Office procedure manual provides that "unlike the selection of second opinion examining physicians, the selection of referee physicians is made by a strict rotational system using appropriate medical directories" and specifically states that "the Physicians' Directory System (PDS) should be used for this purpose."⁷ The Office procedure manual explains that the "PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations" and states that "the database of physicians for referee examinations was obtained from the MARQUIS Directory of Medical Specialists."⁸ The MARQUIS Directory of Medical Specialists contains the names of physicians certified by the American Board of Medical Specialties.⁹ The MARQUIS Directory of Medical Specialists does not include a Board of Orthopedic and Reconstructive Spine Surgery in its list of approved Boards and further does not list Dr. Valentino in its list of Board-certified physicians.¹⁰ Therefore, Dr. Valentino does not appear to be a Board-certified physician within the definition set forth by the Office in its procedure manual. Accordingly, Dr. Valentino's opinion cannot be accorded the special weight given to an impartial medical specialist and, therefore, the Office had no basis for its termination

⁶ 5 U.S.C. §§ 8101-8193, 8123(a).

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (March 1994).

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.7(a) (March 1994).

⁹ Dr. Valentino is not listed on the internet site for The American Board of Medical Specialties. (www.abms.org).

¹⁰ The American Board of Medical Specialties Directory of Board Certified Medical Specialists (30th ed. 1998). Furthermore, Dr. Valentino is not listed as a Board-certified physician in the American Medical Association *Directory of Physicians in the United States*, (35th ed. 1996).

of appellant's compensation benefits based on his opinion.¹¹ As the record contains an unresolved conflict of medical opinion on the extent of appellant's disability, the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

The December 29, 2000 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
August 27, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ *Albert Cremato*, 50 ECAB 550, 551-52 (1999) (the Board found that an osteopathic physician certified by the American Osteopathic Board could not serve as an impartial medical examiner as his credentials did not comply with standards set forth in the Office's procedural manual).